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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
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11 MICHAEL HOLTSINGER,

No. CIV S-03-0732-MCE-CMK-P

12 Plaintiff,

13 vs.

FINDINGS AND RECOMMENDATIONS

14 J.M. BRIDDLE, et al.,

15 Defendants.
16 _____/

17 Plaintiff, a state prisoner, brings this civil rights action pursuant to 42 U.S.C. §
18 1983. Pending before the court is Plaintiff's motion for sanctions (Doc. 293). This matter was
19 addressed at the July 23, 2009, status conference, and order thereafter (Doc. 302).

20 The undersigned, after considering the motion for sanctions and the discussion at
21 the status conference, ordered Defendant to appear and make herself available for a deposition, in
22 Davis, California, on or before August 28, 2009, in order to avoid the imposition of fact
23 establishing sanctions. The undersigned set forth specific dates the deposition could be held, and
24 cautioned that Defendant's failure to appear and cooperate at a deposition as ordered would
25 result in the imposition of sanctions, pursuant to Federal Rule of Civil Procedure 37(b)(2)(A)(i),
26 resulting in the facts alleged in the second amended complaint as to Defendant's liability being

1 taken as established.

2 As ordered, on September 4, 2009, Plaintiff notified the court that Defendant had
3 not appeared at her deposition. Plaintiff also provided the court with his proposed facts as alleged
4 in the complaint establishing Defendant's liability.

5 Imposition of fact establishing sanctions under Rule 37(b)(2)(A)(i), are dispositive
6 of her defense to liability. Such dispositive matters require a magistrate judge to enter a finding of
7 fact and recommended disposition. See Fed. R. Civ. P. 72; Maisonville v. F2 America, Inc., 902
8 F.2d 746, 747-78 (9th Cir. 1990) (discussing magistrate jurisdiction over dispositive and non-
9 dispositive matters).

10 The undersigned finds issuance of fact establishing sanctions pursuant to Rule
11 37(b)(2)(A)(i) are appropriate for Defendant's failure to appear at her deposition as ordered.
12 Defendant was cautioned that such sanctions would be imposed if she failed to appear as ordered.
13 See Malone v. U.S. Postal Service, 833 F.2d 128, 130 (9th Cir. 1987). This was Defendant's
14 second failure to follow a court order directing her to appear at a deposition. Such actions on the
15 behalf of the Defendant demonstrates that less drastic sanctions will not be availing. In March
16 2007, the Clerk of the Court entered Defendant's default pursuant to her failure to appear in this
17 matter. For good cause shown, Defendant's default was set aside in August 2008, allowing her
18 an opportunity to defend against this action. Her continued failure to act, and follow court
19 orders, violates the public's interest in the expeditious resolution of this litigation, the court's need
20 to manage its own docket efficiently, and the risk of prejudice to Plaintiff. See Bautista v. Los
21 Angeles County, 216 F.3d 837, 841 (9th Cir. 2000); Malone, 833 F.2d at 130 (setting forth the
22 five factors the court should weigh before imposing the harsh sanction of dismissal). Accordingly,
23 the undersigned will recommend Plaintiff's motion for sanctions be granted, and the facts alleged
24 in Plaintiff's complaint regarding Defendant's liability be taken as established. While these facts
25 will establish liability, they do not establish the extent of Plaintiff's injuries or any resulting
26 damages.

1 Accordingly, pursuant to Federal Rule of Civil Procedure 37(b)(2)(A)(i), 37(d),
2 the following facts should be deemed established:

- 3 1. On June 22, 2002, Defendant was on duty as a Medical Technical
4 Assistant at High Desert State Prison, Susanville, California.
- 5 2. In Defendant's working capacity, she was responsible for the health
6 care needs of inmates who received injuries in Administrative
7 Segregation, referral of inmates to the emergency room, sick call
8 rounds in the housing unit, dispensing of medication, collection of
9 medical care request forms, and decontamination of inmates
10 exposed to blood and basic inmate care needs.
- 11 3. At all times relevant to the events described herein, Defendant acted
12 under color of state law.
- 13 4. At all times relevant, Plaintiff was incarcerated at High Desert State
14 Prison, Susanville, California.
- 15 5. At all times relevant, Plaintiff's cellmate, Paul Magnan, was
16 incarcerated at High Desert State Prison, Susanville, California.
- 17 6. On June 22, 2002, at approximately 1300 hours, after entering the
18 exercise yard, Plaintiff and Magnan were assaulted. Magnan was
19 assaulted by two inmates resulting in his loss of consciousness and
20 bleeding from the head. Plaintiff was simultaneously assaulted by
21 four inmates resulting in serious injuries to his body.
- 22 7. Immediately after the assault, Yard Gunner J. Delgado ordered
23 Plaintiff to drag Magnan off the yard. Plaintiff had serious injuries
24 and, thus, had difficulty dragging Magnan. However, Plaintiff
25 complied with Yard Gunner Delgado's orders and managed to
26 cross the threshold of the doorway. As Plaintiff dragged Magnan,
Plaintiff was bleeding from his legs and knees and was exposed to
Magnan's blood.
8. Plaintiff was placed in a D7-B Section holding cage after being
assaulted.
9. Defendant approached Plaintiff while he was in the holding cage at
which time he was bleeding from two large abrasions to both of his
knees, had Magnan's blood smeared across his left calf and knee,
injured knee joints to both legs, injury to right rib cage, injury to
sternum, injury to lower back muscles, sore kidneys, sore middle
back area, injured right shoulder, injured right elbow, injured right
wrist, loss of hearing to Plaintiff's right ear, four inch laceration
between his shoulders at the base of his neck, contusions to his
right eye, split upper lip, large contusion to his forehead from right
hairline to left hairline, large contusion from eyebrow to scalp, three
knots/lumps to forehead approximately three quarters of an inch to

1 an inch in height and approximately one and a half inch at the base
2 in width, four knots/lumps to scalp approximately the same size as
3 the knots to the forehead, contusions to back and chest, tender
scalp, dizziness, headache, nausea, pain all over his back, chest,
head and knees.

4 10. Defendant came into contact with Plaintiff and became aware of his
5 severe injuries in the holding cage. Defendant was a responding
6 staff member who saw that Plaintiff urgently needed emergency
7 medical treatment. He was suffering from open wounds, had
8 received a beating to his head, and had been exposed to Magnan's
9 blood.

10 11. Defendant, producing only a 3" x 3" yellow "Post-It" pad, asked
11 Plaintiff for his name and CDC number. Defendant stared at
12 Plaintiff's injured face and asked who hit him.

13 12. Defendant instructed Plaintiff to turn around and lift up his shirt.
14 After Plaintiff struggled to lift up his shirt, he turned around and
15 found that Defendant had left the vicinity and took no steps to
16 provide Plaintiff medical care nor made contact with him thereafter
17 regarding his injuries.

18 13. On June 23, 2002, approximately 27 hours after Plaintiff was
19 assaulted, Defendant failed to transfer Plaintiff to High Desert State
20 Prison's Central Treatment Center.

21 14. Plaintiff continued to be in pain in his entire upper body, head,
22 knee, neck, back, shoulder, wrist, and elbow. In addition, swelling
23 to all injuries increased, his contusions darkened and spread, and he
24 could not directly sit up.

25 15. On June 29, 2002, Defendant came into contact with Plaintiff.
26 While Defendant was at Plaintiff's cell door, he attempted to
reiterate his medical needs to Defendant. Defendant responded,
"The Doctor is aware of you two" and walked away.

16 16. On June 22, 23, 25, 2002, Plaintiff continued to contact medical
17 technical assistants regarding his injuries and urgent need for
18 medical treatment.

19 17. Defendant's actions and inactions caused Plaintiff to be deprived of
20 any medical examination for 59 days after the June 22, 2002
21 incident. Defendant's deliberate indifference to Plaintiff's serious
22 medical needs caused this delay.

23 In addition, pursuant to Federal Rule of Civil Procedure 37(d)(3), "the court must
24 require the party failing to act . . . pay the reasonable expenses, including attorney's fees, caused
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1 by the failure” Plaintiff has requested monetary sanctions to cover the costs involved in
2 attending the deposition that Defendant failed to appear for. Plaintiff’s counsel has set forth the
3 expenses which were incurred: \$106.60 in court reporter fees, \$26.30 vehicle costs, \$3.00
4 parking fee, \$169.50 in attorney fees, and \$100.00 in certified law student fees. Defendant
5 objects to the vehicle costs, noting that Plaintiff could have noticed the deposition for Davis and
6 thus not incurred that cost, and the certified law student fees, arguing that charging for both a law
7 clerk and an attorney to make a statement of non-appearance was as an unreasonable expense, as
8 both persons were not necessary.

9 The undersigned finds the expenses as Plaintiff has set forth are reasonable.
10 Setting the deposition in Sacramento instead of Davis was not unreasonable given that Defendant
11 would be coming from Susanville. In addition, having two representatives appear at the
12 deposition was also not unreasonable. This was not a situation, as was the case in the cases cited
13 by Defendant, where three or four attorneys appeared. Here, Plaintiff’s representatives included
14 one certified law student and the supervising attorney. The court notes that in other appearances
15 before the court, there have often been two certified law students representing Plaintiff. Here,
16 only one law student was present. However, a certified law student cannot act on her own, and
17 having her supervising attorney present was necessary. The undersigned finds no unreasonable
18 expense is claimed. Therefore, the \$405.40 requested as monetary sanctions is reasonable and
19 should be awarded. In addition, it is clear from the circumstances of this case that defense
20 counsel is not at fault in Defendant’s failure to appear at her deposition. Therefore, the
21 undersigned finds the monetary sanctions should be issued against Defendant, not counsel.

22 Based on the foregoing, the undersigned recommends that:

- 23 1. Plaintiff’s motion for sanctions (Doc. 293) be granted;
- 24 2. Defendant be ordered to pay Plaintiff’s reasonable expenses for her failure
25 to appear at her deposition, as required by Federal Rule of Civil Procedure 37(d)(3), payable to
26 the King Hall Civil Rights Clinic in the amount of \$405.40; and

1 3. Pursuant to Federal Rule of Civil Procedure 37(b)(2)(A)(i), 37(d), as additional
2 sanctions for Defendant's failure to appear at her deposition as ordered, the facts establishing
3 liability, as set forth above, be deemed established.

4 These findings and recommendations are submitted to the United States District
5 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 20 days
6 after being served with these findings and recommendations, any party may file written objections
7 with the court. The document should be captioned "Objections to Magistrate Judge's Findings
8 and Recommendations." Failure to file objections within the specified time may waive the right to
9 appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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12 DATED: September 25, 2009

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14 **CRAIG M. KELLISON**
15 UNITED STATES MAGISTRATE JUDGE
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